No. SC92236

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ROBIN S. ROGGENBUCK,

Appellant.

Appeal from Platte County Circuit Court
Sixth Judicial Circuit, Division One
The Honorable Abe Shafer, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Robin Scott Roggenbuck ("Defendant") appeals from his convictions of five counts of possession of child pornography (§ 573.037)[1] following a jury trial in Platte County Circuit Court. In this appeal, Defendant advances three claims of error. First, he claims that the trial court clearly erred in overruling his motion to suppress the evidence discovered on his home computer because the investigating officers' search warrant was not supported by probable cause. Second, he argues that the trial court plainly erred in failing to *sua sponte* dismiss four of the five counts of possession of child pornography because the Double Jeopardy Clause prohibited the State from charging multiple counts for what he characterizes as a single act of possession. Third, he contends that the trial court abused its discretion in permitting the State to adduce evidence relating to Defendant's résumés because the documents were not properly authenticated and contained hearsay.

Defendant does not argue that the evidence was insufficient to support his convictions. Viewed in the light most favorable to the jury's verdicts, the evidence showed as follows:

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[1] Statutory citations are to RSMo Cum. Supp. 2007 unless otherwise noted.

In February 2008, Platte City police detective-sergeant Elizabeth Neland obtained a warrant authorizing the police to search Defendant's apartment for, among other things, child pornography on Defendant's computer (Tr. 260, 262).[2] In executing the warrant, the investigating officers seized Defendant's computer and delivered it to the computer-forensic lab for examination (Tr. 264, 286, 290, 314).

Saved on Defendant's desktop[3] was a link to a PowerPoint presentation entitled "PPT Pics" (Tr. 381-82, 451; St. Ex. 36-37). The presentation included a series of five images depicting young boys engaged in sexual activity, including anal and oral sex (Tr. 381, 383-87, 451; St. Ex. 29-33). Each image had been saved to a subfolder entitled "My Pictures" in the user account called "Robin" (Tr. 402, 418-19, 428-29; St. Ex. 29-33). The same subfolder also contained a picture of Defendant labeled "My Pic" (Tr. 416; St. Ex. 22).

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[2] The facts relating to Detective Neland's application for the search warrant were not presented to the jury. To the extent those facts are relevant to the disposition of Defendant's first point, they are set forth in the argument section, *infra*.

[3] The "desktop," in this context, refers to the screen immediately visible to a computer user upon logging into the computer (Tr. 382).

Using metadata extracted from Defendant's computer, the forensic examiner was able to determine when each image was "created" on Defendant's system (Tr. 397-431; St. Ex. 29-33). Some of the images appeared on Defendant's hard drive multiple times, and there were thus multiple creation dates for the files containing those images (Tr. 401-13, 418-19, 428-29; St. Ex. 29, 30, 33).[4] The examiner indicated that the creation date of an image file could correspond to the date that the file was downloaded from the Internet (Tr. 421-22). The earliest creation date for each pornographic image file was as follows:

Exhibit number for pornographic image[5]	Earliest creation date	Exhibit number for metadata report
17	1/13/07 (6:47 pm)	32 (Tr. 427-28)
18	1/13/07 (6:49 pm)	31 (Tr. 420-22)

[4] Each of the five counts in this case were based on different pornographic images; no count charged Defendant with possessing a duplicate of an image charged in another count (Tr. 489; St. Ex. 17-21; 29-33).

[5] Full-size copies of the five charged images of child pornography were admitted at trial as State's Exhibits 17 through 21 (Tr. 383-87). Because it does not appear that the content of these images is germane to Defendant's points on appeal, Respondent has not filed these exhibits with this Court.

19	1/23/07	29 (Tr. 401-14)
20	2/1/07	33 (Tr. 428-29)
21	1/31/07	30 (Tr. 417-19)

The author of the PowerPoint presentation was identified within the program's metadata as "Robin" (Tr. 451-52; St. Ex. 48).

The icon representing the PowerPoint file containing the pornographic images was surrounded by a number of other icons, including several links to document files purporting to be résumés (St. Ex. 36-37). Six of these files contained versions of what appeared to be Defendant's résumé (Tr. 438, 441-48). In these résumés, Defendant indicated that he had received training in computer applications and sought work that would require him to use his computer skills (Tr. 442-43, 447).

Defendant presented no evidence at trial. In closing, he admitted that the computer was his and that he used it, but argued that his computer account was accessible to others and that he did not know about the child pornography (Tr. 497-503).

The jury found Defendant guilty of all five counts of possessing child pornography (Tr. 510-11; L.F. 97-101). The court sentenced Defendant as a

persistent offender to five consecutive terms of seven-years imprisonment, for a total of 35 years (L.F. 40-41, 127-28; Tr. 32-33, 526).

ARGUMENT

I. The trial court did not err in overruling Defendant's motion to suppress the evidence seized from Defendant's computer pursuant to a search warrant.

In his first point, Defendant argues that the trial court erred in overruling his motion to suppress the evidence seized from Defendant's computer. App. Sub. Br. at 21-43. Despite the fact that the officers obtained a search warrant authorizing the seizure and search of the computer, Defendant contends that the warrant was improperly issued because the affidavit offered in support of the warrant application failed to state facts sufficient to establish probable cause. App. Sub. Br. at 21-31. He further contends that the "bare bones" affidavit was so deficient that no law-enforcement officer could have believed it was constitutionally adequate to support the warrant; thus, the executing officers could not rely on the warrant in good faith. App. Sub. Br. at 31-43.

Defendant's argument lacks merit. The affidavit in support of the warrant stated facts sufficient to permit the issuing judge to find probable cause to search and seize Defendant's computer and the files thereon. Further, even if this Court believes the issuing court erred in finding probable cause, the warrant application was not so deficient that the investigating officers could not

rely on the facially valid warrant in good faith. The trial court did not clearly err in overruling Defendant's motion to suppress.

Standard of review

In determining whether the affidavit supporting the warrant stated facts sufficient to establish probable cause, the Court "review[s] the issuance of the warrant to see if the *issuing judge* had a substantial, common-sense basis, in view of the totality of the circumstances, that probable cause existed at the time the warrant was issued." *State v. Henry*, 292 S.W.3d 358, 362 (Mo. App. W.D. 2009) (emphasis original). The Court gives "great deference on review to the initial judicial determination of probable cause made at the time of the issuance of the warrant" and will reverse "only if that determination is clearly erroneous." *State v. Baker*, 103 S.W.3d 711, 720 (Mo. banc 2003) (quoting *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990)).

Whether the good-faith exception to the exclusionary rule applies is a question of law that is reviewed *de novo*. *United States v. Campbell*, 603 F.3d 1218, 1225 (10th Cir. 2010).

Additional facts

When Detective Sgt. Neland applied for a warrant to search Defendant's apartment, she attached an affidavit that alleged the following:

My name is Elizabeth Neland. I have been employed at the Platte City Police Department for five years and six months. I have been a Detective Sergeant with the department for approximately three years. Prior to my current position I served as a road patrol officer with the Platte City, Missouri Police Department.

I am requesting a Search Warrant for the apartment residence located at 400 Studio Drive, Building A, apartment # 2, Platte City, Platte County, Missouri. The residence of Robin S. ROGGENBUCK . . ., an apartment located in the French Studio Apartment Complex located north of the 600 block of Main in Platte City, Platte County, Missouri. [Describes location and appearance of apartment]. Detective Sergeant Elizabeth Neland spoke with Connie Keyes, Martin Realty, property manager of the French Studio Apartments and she verified that ROGGENBUCK resides at 400 Studio Drive, Building A, Apartment #2, since December 5, 2006 and that no other persons are listed as residents of the apartment.

. . . .

Search to include but not limited to the bedroom area under bed where [E.M.] stated the massager and "sex toys" are kept; and the area under the kitchen sink where [E.M.] stated the alcohol ROGGENBUCK provides to minors is kept.

On February 13, 2008, Detective Sergeant Elizabeth Neland received information from [E.M.] . . . that Robin S. ROGGENBUCK, w/m 07-26-1952, at 400 Studio Drive, Building A, Apartment # 2, Platte City, Platte County, Missouri, had been sexually abusing [E.M.] for the past five months at ROGGENBUCK'S residence.[6] [E.M.] indicated that ROGGENBUCK has a computer system in the living area of the apartment. [E.M.] reported the computer system is located to the left of the door upon entry and it is placed on a glass type desk. [E.M.] stated that ROGGENBUCK has images of children approximately ten years of age and older on his computer system. [E.M.] stated that ROGGENBUCK would ask him to look at the images.

On February 13, 2008, [E.M.] informed Detective Sergeant Elizabeth Neland that Robin S. ROGGENBUCK had stuck his finger and other "sex toys" in his buttocks penetrating the anal cavity. [E.M.] stated the sex toys were kept under ROGGENBUCK'S bed and that there was only one bed in the apartment. [E.M.] reported there are other victims and provided first names of these victims. [E.M.] stated ROGGENBUCK keeps

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[6] Although E.M. is not a minor, his identifying information is omitted from this brief pursuant to § 566.226 because he is an alleged victim of sexual assault.

> a supply of alcohol under the kitchen sink and gives alcohol to the boys to "have his way with them."
>
> On February 11, 2008, Nina Epperson, M.S., a psychologist, accompanied [E.M.] to the residence located at 400 Studio Drive, Building A, Apartment # 2, Platte City, Platte County, Missouri, to gather his belongings and while inside the residence observed large quantities of alcohol and a large massager plugged into the bedroom wall.

(Supp. L.F. 1-2). Detective Sgt. Neland sought authorization to search Defendant's apartment for adult "sex toys," alcohol, and the computer and computer files for items, records, or documents relating to the offense of possession of child pornography (Supp. L.F. 1-3).

The warrant was issued the afternoon of February 13, 2008, by Judge Hull (Tr. 12; Supp. L.F. 5).

Discussion

A. *The search warrant was supported by probable cause.*

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures," and guarantees that "no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. The Missouri Constitution provides the same

protection against unreasonable searches and seizures, thus the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. *State v. Grayson*, 336 S.W.3d 138, 143 n.2 (Mo. banc 2011); MO. CONST. art. I § 15. Whether or not probable cause exists in a particular case is a question of fact. *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990). It is "determined from the four corners of the application of the search warrant and any supporting affidavits." *State v. Buchli*, 152 S.W.3d 289, 304 (Mo. App. W.D. 2004). "In determining whether probable cause exists, the issuing magistrate or judge must 'make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her] . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *State v. Neher*, 213 S.W.3d 44, 49 (Mo. banc 2007) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "The presence of such contraband or evidence need not be established at a *prima facie* level, by a preponderance of the evidence, or beyond a reasonable doubt." *Id*.

The question of probable cause deals with probabilities, not certainties. *Henry*, 292 S.W.3d at 364 (citing *Gates*, 462 U.S. at 231). "These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id*. The affidavit in support of a search warrant should be weighed as it would be understood by a law-enforcement officer "and not by someone with a legal education who

conducts the library analysis of a scholar." *State v. Norman*, 133 S.W.3d 151, 159 (Mo. App. S.D. 2004); *see also Gates*, 462 U.S. at 232. Thus, a search warrant should not be deemed invalid by interpreting affidavits "in a hyper technical rather than common sense manner." *Henry*, 292 S.W.3d at 364.

Indeed, "[c]ommon sense is a key ingredient in considering the absence or presence of probable cause." *State v. Wilbers*, 347 S.W.3d 552, 557 (Mo. App. W.D. 2011) (quoting *State v. Rush*, 160 S.W.3d 844, 849 (Mo. App. S.D. 2006)). It is not the case that "each factual allegation which the affiant puts forth must be independently documented," nor is it required that "each and every fact which contributed to his conclusions be spelled out in the complaint." *Gates*, 462 U.S. 213, 230 n.6 (quoting *Jaben v. United States*, 381 U.S. 214, 224 (1965)). The officer requesting the warrant must simply present enough information to the issuing judge "to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." *Gates*, 62 U.S. 213, 230 n.6 (quoting *Jaben*, 381 U.S. at 224-25).

There is a strong preference for warrants, and "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States v. Ventresca*, 380 U.S. 102, 106 (1965). "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause"; the preference for warrants is thus "effectuated by according

'great deference' to the issuing court's determination." *United States v. Leon*, 468 U.S. 897, 914 (1984). "Even when the sufficiency of an affidavit is marginal, [this Court's] determination should be informed by the preference accorded to warrants." *Henry*, 292 S.W.3d at 364.

Defendant argues that the affidavit in this case was insufficient because it failed to state adequate facts identifying a crime that had been committed. App. Sub. Br. at 24-31. He is wrong. According to the affidavit, E.M. contacted Detective Sgt. Neland and informed her that Defendant had been sexually abusing him (Supp. L.F. 2). E.M. reported that Defendant had "stuck his finger and other 'sex toys' in his buttocks, penetrating the anal cavity" (Supp. L.F. 2).

Defendant protests that E.M. is an adult and claims that nothing in the affidavit states that the reported sodomy was non-consensual. App. Sub. Br. 25-26. But this argument ignores both the fact and nature of E.M.'s report. The fact that E.M. went to the police and reported that Defendant had sodomized him implies that the activity was non-consensual. Further, the use of the term "sexual abuse" in describing E.M.'s report necessarily entails an allegation that Defendant compelled E.M. to submit to the sexual contact. *See* § 566.100 (stating that "sexual abuse" occurs when one person subjects another "to sexual contact by the use of forcible compulsion"). From the information in the affidavit, the issuing court could reasonably find a probability that Defendant had criminally abused E.M.

The affidavit also noted E.M. had reported the existence of other victims (Supp. L.F. 2). Defendant argues that these "other victims" may have been adults just like E.M. and might have engaged in consensual sexual activity with Defendant. App. Sub. Br. at 27-28. But in making this argument, Defendant draws inferences from the facts in the light most favorable to him, not the light most favorable to the issuing court's ruling. E.M. told Detective Sgt. Neland that Defendant "keeps a supply of alcohol under the kitchen sink and gives the alcohol to the boys to 'have his way with them'" (Supp. L.F. 2). E.M. also said that Defendant provides the alcohol under the sink "to minors" (Supp. L.F. 2). The court, acting within its broad discretion, could easily and reasonably interpret the affidavit to allege that Defendant had plied minor boys with alcohol and sexually abused them. And, of course, supplying alcohol to minors is itself unlawful. *See* § 311.310.2. The issuing court thus had probable cause to believe that Defendant had committed a crime against E.M. and an unknown number of minor victims, and, further, that evidence relating to those crimes (*i.e.* sex toys and a large quantity of alcohol) would be found in Defendant's apartment.

Defendant argues that even if the affidavit established probable cause to permit a search of the apartment, the document provided no basis to permit the investigators to seize and search the computer. App. Sub. Br. at 28-31. Defendant forgets, however, that E.M. reported that Defendant had "images of

children approximately ten years of age and older on his computer system" and that Defendant "would ask [E.M.] to look at the images" (Supp. L.F. 2). "Only the probability of criminal activity, not a prima facie showing, is the standard of probable cause." *State v. Miller*, 14 S.W.3d 135, 138 (Mo. App. E.D. 2000); *see also Neher*, 213 S.W.3d at 49. As noted above, a search-warrant affidavit need not include every fact that contributes to the conclusions drawn therein. *See Gates*, 462 U.S. 213, 230 n.6. In determining whether to issue a search warrant, a court may infer from the facts set forth in the affidavit that evidence related to criminal activity may be found in a particular place. *See e.g. Miller*, 14 S.W.3d at 136-38.

In *Miller*, investigators sought a search warrant for the defendant's home based on allegations stating that the defendant had purchased large quantities of lithium batteries and pseudoephedrine, that these items are known to be necessary components in the manufacture of methamphetamine, and that the defendant had used a false name when he purchased the pseudoephedrine. *Id*. at 136-37. On these facts, the circuit court issued a warrant authorizing the police to search the defendant's home and any outbuildings for "illegal drugs, narcotics, recipes and other documents or writings related to the manufacture, production, or sale of illegal drugs, narcotics, and controlled substances." *Id*.

On appeal, the defendant argued that the search warrant was not supported by probable cause. *Id*. at 137. The Court of Appeals disagreed,

emphasizing that the mere probability of criminal activity was sufficient to establish probable cause. *Id*. at 138. The court observed that it was "unlikely" that the defendant had a legitimate use for the large quantities of pseudoephedrine and lithium batteries that he had purchased. *Id*. The court further recognized that an issuing court "is given license to draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense." *Id*. The court found no error in the issuing court's determination that the defendant likely transported the purchased materials to his residence. *Id*.

In this case, the issuing court could reasonably infer that Defendant's computer contained evidence of criminal activity in two respects. First, the court could have determined that the computer may have contained evidence related to Defendant's alleged abuse of the other "boys." As explained above, E.M. told police that Defendant provided alcohol to young boys and had his way with them (Supp. L.F. 2). And E.M. also reported that Defendant had images of children on his computer (Supp. L.F. 2). One could reasonably suspect that the images Defendant had on his computer might be images of his victims and that acquiring these images could assist the State in identifying these children. Thus, the facts raise a reasonable probability that evidence (*i.e.* digital images) related to Defendant's alleged abuse of the boys would be located on Defendant's computer. *See e.g. State v. Johnson*, No. SD 31437, 2012 WL 2899565 (Mo. App.

S.D. July 17, 2012) (recognizing the "intuitive relationship" between child molestation and the possession of child pornography, and noting that "[c]hild pornography is in many cases simply an electronic record of child molestation.") (quoting *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010)).

Second, common sense dictates that the images on the computer must have related to sexual abuse, otherwise E.M. would not have mentioned them. It would have made no sense, for example, for E.M. to contact the police, report that he had been sexually abused by Defendant, and then also mention that Defendant had photos on his computer that were entirely innocent and had nothing to do with his criminal complaint. The issuing court, considering the totality of the circumstances, could reasonably infer that the computer probably contained evidence relating to the sexual abuse of children.

Defendant argues that the affidavit presented in this case "is the type of conclusory and 'bare bones' affidavit condemned" in *State v. Hammett*, 784 S.W.2d 293 (Mo. App. E.D. 1989), and *State v. Brown*, 741 S.W.2d 53 (Mo. App. W.D. 1987). App. Sub. Br. at 30-31. But the deficient affidavits in *Hammett* and *Brown* in no way resembled the affidavit at issue here.

In *Hammett*, a warrant issued based on an affidavit containing uncorroborated information received from an anonymous informant, whose own information was obtained fourth-hand. *See* 784 S.W.2d at 294, 296-97. In this case, on the other hand, Detective Sgt. Neland's affidavit was based primarily on

the first-hand observations of E.M., an identified source (Supp. L.F. 1-2). Unlike the chain of unidentified declarants in *Hammett*, E.M. claimed to have been personally victimized by Defendant and to know of other victims (Supp. L.F. 2). E.M. had personally seen the images of children on Defendant's computer (Supp. L.F. 2). Moreover, E.M.'s report about the presence of sex toys and alcohol (used in seducing the "boys") was corroborated by his psychologist, who went to Defendant's apartment to help E.M. gather his belongings (Supp. L.F. 2). The deficiency of the affidavit in *Hammett* thus sheds no light on the sufficiency of the affidavit here.

In *Brown*, an officer observed a Chrysler Cordoba matching the description of a vehicle used in a robbery pull into a parking lot near a Monte Carlo. 741 S.W.2d at 55-56. The occupants of the vehicles chatted for a few minutes, then left together. *Id*. at 56. The officer followed, then stopped behind the vehicles when they voluntarily pulled over. *Id*. The officer obtained consent and searched the Cordoba, but did not find the stolen property. *Id*. The occupants of the Cordoba and the Monte Carlo were acquainted and admitted that they were traveling together. *Id*. Based on this information, the officer sought and obtained a warrant to search the Monte Carlo for the stolen property. *Id*. On appeal, the Court of Appeals found that the affidavit failed to state facts supporting probable cause, as there were no facts whatsoever to

support a judgment that the Monte Carlo was part of, or contained the fruits of, a criminal enterprise. *Id*. at 57-58.

Here, in contrast, the affidavit clearly and unambiguously linked Defendant to criminal activity. E.M.'s report that Defendant had sexually abused him and had also "ha[d] his way with" underage boys after plying them with alcohol gave rise to the probability that Defendant had engaged in criminal conduct. And, in light of E.M.'s revelation that Defendant showed him pictures of children on the computer, the court had additional cause to believe that evidence related to the sexual abuse of children might be found thereon.

The affidavit in support of the warrant stated adequate facts to permit the issuing judge to find a reasonable probability that evidence related to criminal activity would be found on Defendant's computer. The court did not err in issuing the warrant, and, accordingly, the trial court did not err in denying Defendant's motion to suppress.

B. *The police relied in good faith on the facially valid search warrant*.

Even if this Court concludes that the issuing court erred in finding that probable cause existed to support the issuance of the warrant, the application of the exclusionary rule is not appropriate because the police relied in good faith on the warrant when they conducted their search.

Generally, evidence obtained as a direct result of an unlawful search or seizure is considered "fruit of the poisonous tree" and is inadmissible at trial.

See e.g. Mapp v. Ohio, 367 U.S. 643, 655 (1961); *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963). But the application of the exclusionary rule is not automatic; it is to be the court's "last resort," not its "first impulse." *See Herring v. United States*, 129 S.Ct. 695, 699-700, 704 (2009). "Whether the exclusionary sanction is appropriately imposed in a particular case . . . is an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Hudson v. Michigan*, 547 U.S. 586, 591-92 (2006) (citations omitted). Because the purpose of the exclusionary rule is to deter future police misconduct, the rule will not be applied where its use will have no appreciable deterrent effect on the behavior of law-enforcement officers. *See Arizona v. Evans*, 514 U.S. 1, 13-14 (1995).

"When police act in reasonable reliance on a facially valid search warrant issued by a detached and neutral magistrate, the exclusionary rule will not operate to bar evidence obtained under the search warrant, even though the warrant may be invalid." *Buchli*, 152 S.W.3d at 305-06 (citing *United States v. Leon*, 468 U.S. 897, 920-21 (1984)). "[W]hen an officer, acting in objective good faith, obtained a search warrant from a magistrate and acted within its scope," applying the exclusionary rule would have no deterrent effect, as an officer's "sole responsibility after obtaining a warrant is to carry out the search pursuant to it." *Illinois v. Krull*, 480 U.S. 340, 349 (1987) (citing *Leon*, 468 U.S. at 920-21).

Although the exclusionary rule generally will not apply where the officers conducting the search reasonably relied on a warrant, evidence seized as a result of a warrant-supported search may still be subject to suppression if: (1) the magistrate or judge issuing the warrant was misled by information in the affidavit that the affiant knew was false or would have known was false but for a reckless disregard for the truth; (2) the magistrate wholly abandoned his judicial role; (3) the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or (4) the warrant was so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid. *Leon*, 468 U.S. at 923.

Defendant argues that the third exception applies in this case—that the supporting affidavit was so lacking in indicia of probable cause that no reasonable police officer could rely on it in good faith. App. Sub. Br. at 31-32. In advancing this argument, he repeats his assertion that the affidavit in this case was "bare bones" and "provided no basis to believe even that any criminal activity occurred." App. Sub. Br. at 31-32.

But it cannot be said that the officers acted entirely unreasonably in relying on the warrant. The Western District Court of Appeals recently defined "entirely," in the context of analyzing whether an officer's reliance on a warrant was "entirely unreasonable," as "absolute and unqualified" and "wholly and

completely." *Wilbers*, 347 S.W.3d at 562 n.7. The reasonableness of an officer's reliance must be measured in recognition of the officer's duty to enforce the law. As the United States Supreme Court noted in *Leon*, it is the responsibility of the magistrate, not the individual police officer, to determine whether particular allegations establish probable cause. 468 U.S. at 921. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Id*. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Id*.

There is no allegation here that Detective Sgt. Neland provided false or misleading information to the issuing judge. And despite Defendant's allegations to the contrary, the affidavit submitted in support of the warrant was far from "bare bones"—it included facts alleging that Defendant had sexually abused an adult male and an unknown number of young boys and that he had images of children on his computer. The issuing court determined that the facts submitted established probable cause to search Defendant's apartment, including the contents of his computer. Even if the issuing court erred in finding probable cause, Neland and her fellow officers reasonably, and in good faith, relied on the court's finding in executing the search.

Moreover, Defendant's exclusive focus on the language of the affidavit, in evaluating whether the officers executing the warrant did so in good faith, is too

limited. It is true that, "[l]ike the determination of probable cause, 'the determination of good faith will ordinarily depend on an examination of the affidavit by the reviewing court.'" *State v. Pattie*, 42 S.W.3d 825, 828 (Mo. App. E.D. 2001) (quoting *United States v. Gant*, 759 F.2d 484, 487-88 (5th Cir. 1985)). But unlike the determination of probable cause, the good-faith analysis is not limited to the four-corners of the warrant application. "When assessing the objective [reasonableness] of police officers executing a warrant, [the court] must look to the totality of the circumstances, including any information known to the officers but not presented to the issuing judge." *United States v. Perry*, 531 F.3d 662, 665 (8th Cir. 2008). The ultimate question is whether a reasonably trained officer would have known that the search was illegal, in light of all the circumstances. *United States v. Fiorito*, 640 F.3d 338, 346 (8th Cir. 2011).

In his brief, Defendant identifies a split among various jurisdictions regarding whether information known to law-enforcement officers but not included in the probable-cause affidavit may be considered by a reviewing court in determining whether the officers acted in good-faith in executing the warrant. App. Sub. Br. at 33-34. But then Defendant points to language in *Leon*, the watershed United States Supreme Court case on the good-faith exception to the exclusionary rule, that resolves the disagreement. As Defendant notes, the Supreme Court held in *Leon* that, in determining whether a reasonably-trained officer would have known that a search was illegal despite obtaining a warrant,

"all of the circumstances—including whether the warrant application had been previously rejected by a different magistrate—may be considered." App. Sub. Br. at 35 n. 10 (quoting *Leon*, 468 U.S. at 922 n. 23). If an officer's knowledge that her application for a search warrant had previously been rejected (a fact that would not be included in a subsequent affidavit) supports a finding that the officer did not act in good faith on the warrant issued by a different magistrate, it follows that other facts known to the officer that would lead her to believe that the search was lawful, such as additional incriminating evidence known to her, would support a finding that the officer executed the search warrant in good faith. The additional facts, both supporting and undermining a finding of good faith, are encompassed within "all the circumstances" deemed relevant by the Supreme Court.

Defendant further argues that looking outside the four corners of the affidavit in determining whether the good-faith exception applies is problematic in Missouri because Missouri does not permit consideration of oral testimony in determining whether probable cause exists to issue a warrant. App. Sub. Br. at 39. Defendant's concern is misplaced. The determination of whether the good-faith exception applies is made not when the warrant is issued, but later, at a suppression hearing. At such a hearing, the circuit court "shall receive evidence on any issue of fact necessary to decide the motion." § 542.296.6. In this case, Detective Sgt. Neland testified at the suppression hearing, as authorized by law.

Neland testified that E.M. told her that Defendant's computer "contained pornographic images of children" (Tr. 14). This additional information, known to Neland but omitted from the warrant application, strengthens Neland's good-faith reliance on the warrant. *See United States v. Thurman*, 625 F.3d 1053, 1057 (8th Cir. 2010) (observing that additional facts known to investigating officers but not to magistrate who issued the warrant "'bolster[ed] the officers' good-faith reliance on the warrant"). The allegation that the images were "pornographic" was not merely a legal conclusion, as Defendant argues. Though the word "pornography" has a legal meaning, it is also commonly used to describe "the depiction of erotic behavior designed to cause sexual excitement." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1767 (1993). It does not take a legal scholar to recognize that E.M. was describing something illegal when he told Neland that pornographic images of children were on Defendant's computer.

The affidavit in support of the warrant application stated adequate facts to establish probable cause to search Defendant's property. Further, Detective Sgt. Neland and her colleagues executed the warrant in good faith. The trial judge did not err in overruling Defendant's motion to suppress the evidence. Point I should be denied.

II. The trial court did not plainly err in declining to *sua sponte* dismiss four of Defendant's five convictions for possession of child pornography on double-jeopardy grounds.

In his second point, Defendant argues that the trial court plainly erred in entering five[7] separate convictions for possession of child pornography because the Double Jeopardy Clause prohibits the entry of multiple convictions for possession of a series of pornographic images. App. Sub. Br. at 44-52. Defendant relies heavily on this Court's decision in *State v. Liberty*, 370 S.W.3d 537 (Mo. banc. 2010), in which the Court held that splitting a single act of possession of child pornography into multiple counts for each image possessed violates the Constitutional prohibition against double jeopardy.

Unlike the evidence in *Liberty*, however, the evidence in this case showed that each of Defendant's five convictions was based on the possession of different pornographic images that were acquired at *different times*. Thus, Defendant's five convictions were based not on a single instance in which he possessed

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[7] In his Point Relied On, Defendant mistakenly asserts that he was convicted of eight counts of possession of child pornography. App. Sub. Br. at 44. This appears to be a typographical error; Defendant was convicted of only five counts (L.F. 127-28).

multiple images, but rather on five separate, distinct acts of possession. Because it is not evident, obvious, and clear on the face of the record that Defendant's right to be free from double jeopardy was violated, the trial court did not plainly err in entering judgment on each of Defendant's five convictions.

Standard of review

Defendant concedes that he did not object to his convictions on double-jeopardy grounds at the trial-court level, and thus his claim is not preserved for appellate review. App. Sub. Br. at 44. Generally, the rule in Missouri is that constitutional claims are waived if not raised at the earliest possible opportunity. *E.g. Smith v. Shaw*, 159 S.W.3d 830, 836 (Mo. banc 2005). This Court has identified a limited exception, however, in cases involving double jeopardy. *See Ross v. State*, 335 S.W.3d 479, 481 (Mo. banc 2011). A defendant may obtain relief on an unpreserved claim of double jeopardy where "it can be determined *from the face of the record* that the court had no power to enter the conviction." *See id*. (emphasis original); *see also State v. Royal*, 277 S.W.3d 837, 841 (Mo. App. W.D. 2009). Thus, to determine whether Defendant is entitled to the relief he seeks, this Court must decide whether it is clear from the face of the record that the trial court lacked the authority to enter each of Defendant's five convictions.

Discussion

"The Fifth Amendment to the United States Constitution guarantees the right against double jeopardy, and the Due Process Clause in the Fourteenth Amendment extends that protection to state prosecutions." *State v. George*, 277 S.W.3d 805, 807 (Mo. App. W.D. 2009). The doctrine of double jeopardy generally protects defendants from successive prosecutions for the same offense after an acquittal or conviction and from multiple punishments for the same offense. *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010). "Multiple convictions are permissible if the defendant has in law and in fact committed separate crimes." *State v. Flenoy*, 968 S.W.2d 141, 143 (Mo. banc 1998).

The Double Jeopardy Clause's protection from multiple punishments is "designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *State v. Dennis*, 153 S.W.3d 910, 918 (Mo. App. W.D. 2005) (quoting *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992)). Therefore, double-jeopardy analysis regarding multiple punishments is limited to determining whether multiple punishments were intended by the legislature. *Id*. In making this determination, the Court looks to the allowable "unit of prosecution" set forth in the charging statute. *State v. Barraza*, 238 S.W.3d 187, 193 (Mo. App. W.D. 2007).

Section 573.037.1, as it existed when the charged offenses occurred, read as follows:

> A person commits the crime of possession of child pornography if, knowing of its content and character, such person possesses any obscene material that has a child as one of its participants or portrays what appears to be a child as an observer or participant of sexual conduct.

§ 573.037.1. Defendant argues that the use of the phrase "any obscene material," which may refer to one or multiple items, renders the statute ambiguous as to whether the legislature intended that a defendant could be subject to multiple counts for possessing multiple pornographic images on a single occasion. App. Sub. Br. at 48-50. He contends that because the legislature did not unambiguously authorize separate charges for possession of each additional illicit image, the rule of lenity requires that this Court interpret the statute in the light most favorable to Defendant and hold that the Double Jeopardy Clause bars multiple convictions. App. Sub. Br. at 48-50.

In its recent opinion in *State v. Liberty*, this Court agreed with Defendant's interpretation. 370 S.W.3d 537, SC91821 slip op. at 14-25.[8] The Court held that the term "any obscene material" is ambiguous as to number—it

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[8] At the time of this writing, the reporter volume containing *State v. Liberty* had not been published. Thus, pin cites herein are to the slip opinion.

is not clear that possession of more than one illegal item permits prosecution for more than one criminal charge. *Id*., slip op. at 16. As a result, this Court rejected the State's argument that section 573.037 supported convictions for each individual photograph. *Id*., slip op. at 24.

But the Court left open the possibility that a defendant could be charged with multiple counts of possession of child pornography if the evidence showed that the defendant "came into possession of the pornographic photographs on different dates or from different sources." *Id*., slip op. at 19. Indeed, the Court remanded Mr. Liberty's case for retrial, giving the State the opportunity to present evidence "as to the timing of acquisition or the sources of the pornographic photographs . . ." *Id*., slip op. at 28.

In this case, evidence *was* presented at trial to show that Defendant acquired each item of child pornography at a separate, distinguishable time. The evidence showed that Defendant acquired the first two items on January 13, 2007, two minutes apart (Tr. 420-22, 427-28; St. Ex. 31-32). He downloaded another image 10 days later, the fourth image one week after that, and the fifth image one day later (Tr. 401-14, 417-19, 428-29; St. Ex. 29-30, 33). Each of these acts of acquisition and possession are temporally distinguishable. Therefore, it is not clear from the face of the record that the court had no power to enter convictions for each separate count.

Defendant argues that because the charging document and verdict director did not distinguish between the counts on the basis of when the obscene images were acquired, the State cannot rely on such a distinction now. App. Sub. Br. at 50. But Defendant forgets that it was his burden to object to the charging document or instructions if he believed the language therein threatened his right to be free from double jeopardy. *See State v. Shinkle*, 340 S.W.3d 327, 334 (Mo. App. W.D. 2011) ("Because double jeopardy is an affirmative defense, it is the defendant's burden to prove that double jeopardy applies."). Unless the issue of double jeopardy is timely invoked at trial, "the State has no burden of proof or other evidentiary obligation' to disprove the possibility of double jeopardy." *Id*.

The proper time to object to duplicative counts on double-jeopardy grounds is before trial, in a motion to dismiss. *See State v. Miller*, 172 S.W.3d 838, 844 (Mo. App. S.D. 2005) (quoting *State v. Flynn*, 519 S.W.2d 10, 12 (Mo. 1975) ("[T]he earliest possible moment consistent with good pleading and orderly procedure in which a party may raise a constitutional issue relating to the information or indictment is in a motion to dismiss or quash . . . ."")). If Defendant had filed such a motion, the State could have amended the charging document to better reflect the evidence it planned to adduce. The same is true of the instructions. Upon a timely objection, the State could have drafted verdict directors specifying the times in which Defendant allegedly obtained (and thereby possessed) each charged item of child pornography.

Instead, Defendant waited until appeal to untimely assert his constitutional rights and now seeks to be discharged from his convictions. To grant him the relief he seeks would reward him for failing to object, as he would obtain better relief on appeal than he likely would have gotten had he objected at trial (the State could have remedied the defects Defendant now identifies). *See State v. Tipton*, 314 S.W.3d 378, 380 (Mo. App. S.D. 2010) (holding that a defendant's assertion of a double-jeopardy claim on appeal without raising it below was a de facto case of sandbagging, as State no longer had the opportunity to adduce the facts necessary to rebut the double jeopardy claim).

Defendant protests that to preserve his right to trial by jury, the particular dates on which each image of child pornography was acquired needed to be submitted to the jury and found beyond a reasonable doubt. App. Sub. Br. at 51. But those dates, while significant, do not constitute elements of the charged offenses. To secure a criminal conviction, the State must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] was charged." *State v. Taylor*, 238 S.W.3d 145, 148 (Mo. banc 2007). In *Taylor*, this Court held that a crime's location—the venue in which the offender may be prosecuted—was not an element of the crime and, therefore, did not need to be proven to the jury beyond a reasonable doubt. *Id*. at 148-49. The same is true of the dates the pornography was acquired in this case. The dates are legally significant in that they establish, for purposes of double-jeopardy

analysis, that each possession constituted a separate act. But the dates are not elements of the offenses. *See* § 573.037. Because the necessary evidence was adduced at trial (unlike in *Liberty*), this case need not be remanded for additional evidence or findings of fact.

A defendant "bears a heavy burden of making a clear showing that manifest injustice results from . . . plain error." *State v. Clifford*, 815 S.W.2d 3 (Mo. App. W.D. 1991). For the foregoing reasons, it is not clear, *on the face of the record*, that the trial court had no power to enter a judgment of conviction for all five counts of possession of child pornography. Point II should be denied.

III. The trial court did not abuse its discretion in permitting the State to adduce evidence relating to digital copies of Defendant's résumé over Defendant's hearsay and foundational objections.

In his final point, Defendant argues that the trial court abused its discretion in permitting the State to adduce evidence relating to the résumés found on Defendant's computer surrounding the PowerPoint file that included the child-pornography images. App. Sub. Br. at 53-60. He argues that the documents were not shown to be authentic writings of Defendant, and that the content of the documents was inadmissible hearsay. App. Sub. Br. at 53-60.

Defendant's point should be rejected for at least three reasons. First, the State presented sufficient circumstantial evidence to authenticate the résumés as Defendant's writings. Second, even without authenticating the résumés, the State was entitled to support its argument that Defendant had possession of the illicit PowerPoint file with evidence that documents bearing Defendant's name were found surrounding the file. Third, the admission of testimony regarding the content of Defendant's résumés was not so prejudicial that any error in admitting this evidence would entitle him to a new trial.

Standard of review

"A trial court's evidentiary rulings are reviewed for abuse of discretion." *State v. Davis*, 318 S.W.3d 618, 630 (Mo. banc 2010). Accordingly, "[w]hether a

sufficient foundation has been established for an exhibit is a decision within the broad discretion of the trial court." *State v. Minner*, 256 S.W.3d 92, 97 (Mo. banc 2008). A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration. *State v. Seeler*, 316 S.W.3d 920, 929 (Mo. banc 2010). In addition, this Court reviews a trial court's evidentiary rulings for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *State v. Tisius*, 362 S.W.3d 398, 407 (Mo. banc 2012).

Additional facts

When the forensic examiner looked at Defendant's computer, she noticed a number of icons clustered in the lower-right quadrant of the desktop (Tr. 433-35; St. Ex. 36). These icons would not have automatically been placed in that location; the computer user had to move them there manually (Tr. 435). One of the icons linked to the PowerPoint file in which the charged images of child pornography were located (Tr. 451; St. Ex. 36). Several icons surrounding the PowerPoint file linked to document files that purported to be different versions of Defendant's résumés (Tr. 437-49).

At trial, the forensic examiner testified that she opened these documents and reviewed their contents (Tr. 437-49). She said that she opened the document

entitled "Scott Resume KS," which appeared to contain résumé information (Tr. 438). Over Defendant's foundational and hearsay objections, the examiner testified that the document contained Defendant's name, included his email address as rscott52rscott@aol.com, and listed a series of computer applications (including PowerPoint), with which Defendant was purportedly familiar (Tr. 441-42). The examiner testified that, under the "education" heading, the résumé indicated that Defendant had attended the Business Computer Training Institute, had studied Advanced Integrated Computer Applications, and had graduated in the top 10% of his class (Tr. 442-43).

The forensic examiner said that she also examined a file entitled "Update Resume" (Tr. 443). Defense counsel objected to testimony relating to this document, referring to her objection to the previous résumé and also complaining that the information in the new résumé was cumulative (Tr. 444-45). She expressly stated, however, that she did not object to the State eliciting evidence of Defendant's address from the résumé (Tr. 444-45). The Court limited the testimony from "Update Resume" to the following facts: Defendant's name, physical address, email address, and Defendant's "objective"—"to obtain an administrative position utilizing [his] customer service and computer skills" (Tr. 445-47).

The examiner testified, without objection, that she examined the four other files clustered near the PowerPoint file that appeared to be versions of

Defendant's résumé (Tr. 448-49). She stated that each of those documents contained information substantially similar to the other two, and that all referred to Defendant (Tr. 448-49). She also testified that she opened the folder entitled "Scott Resume" and looked at the contents (Tr. 449; St. Ex. 36, 42).

Although a hard copy of each résumé was marked as an exhibit and shown to the forensic examiner for identification, none of the documents was actually offered or received in evidence (Tr. 437-51).

Discussion

A. *The State adduced sufficient evidence to overcome Defendant's foundational and hearsay objections to testimony relating to the résumés.*

Generally, "the execution and authenticity of a private writing must be established before it may be admitted in evidence." *Cummins v. Dixon*, 265 S.W.2d 386, 394 (Mo. 1954). As Defendant points out, "[t]he authenticity of a document cannot be presumed, and what it purports to be must be established by proof." App. Br. at 38 (citing *State v. Cravens*, 132 S.W.3d 919, 930 (Mo. App. S.D. 2004)). But "[d]irect and positive evidence of genuineness of a document is not required for its admission." *State v. Clark*, 592 S.W.2d 709, 717 (Mo. banc 1979) (abrogated on other grounds by *Horton v. California*, 496 U.S. 128 (1990)). "The authenticity may be shown by circumstantial evidence." *Id*.

In this case, the State adduced sufficient circumstantial evidence to permit the trial court to find, within its broad discretion, that testimony relating to the content of the résumés was admissible because they were authored by Defendant. First, the content of the documents themselves—résumé information pertaining to Defendant, his educational background, and his work history—plainly suggests that they were written by Defendant. Defendant is correct, of course, that documents are not self-authenticating, and that "[e]ven if a document purports to have been written and signed by the person to whom it is attributed, that fact, standing alone, is insufficient to establish its authenticity and genuineness." App. Br. at 38 (citing *Cravens*, 132 S.W.3d at 930). But even though the fact that a document purports to be written by a particular person is not, in itself, dispositive of the document's authenticity, the fact is still relevant and may be considered by the trial court in determining whether the evidence should be admitted. *See e.g. State v. Copeland*, 928 S.W.2d 828, 846 (Mo. banc 1996) (overruled on other grounds in *Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008)) (finding the circumstantial evidence sufficient to establish the defendant's authorship of certain letters in part because the defendant identified herself within the letter).

In addition to the content of the documents, the location of the documents strongly suggested that they were authored by Defendant. It was uncontested at trial that the computer was found in Defendant's residence, that he was the

registered owner of the computer, and that he used it (Tr. 264, 269-75, 286, 390, 502). Moreover, the files the forensic examiner reviewed were contained on the "Robin"[9] user account (Tr. 387-88, 402). The examiner testified that documents saved on a computer are unique to the user account; thus, a user who logged onto the computer using a different user account would not have access to those files (Tr. 383, 387-88).

Defendant, citing *Cravens*, argues that the fact that the document was found on his computer is insufficient to authenticate him as the author. App. Sub. Br. at 55-56. But Defendant overstates the holding in *Cravens*. In that case, the defendant claimed that the trial court erred in excluding an address book found in the victim's residence, which he asserted was the victim's. 132 S.W.3d at 928-30. Nothing in the book indicated who it belonged to—at one point, the author mentioned in an entry that she had tuberculosis, but other evidence showed that the victim did not suffer from that ailment. *Id*. The *only* circumstance linking the book to the victim was that it was found in her trailer. *Id*. at 930. The court of appeals found that that fact, "standing alone," was insufficient to authenticate the address book as a document written by the victim. *Id*.

[9] Robin is Defendant's first name (Tr. 269, 277-78).

In this case, on the other hand, the trial court could consider not only the location of the résumés, but also the content. The trial court could reasonably find that Defendant's résumés, found on Defendant's computer in Defendant's user account, were written by Defendant. The possibility that some other, unidentified person prepared the résumés with Defendant's information and then planted them on Defendant's computer next to the child pornography was a matter for the jury to consider in weighing the evidence.

Because the résumés were authored by Defendant, testimony about their content was not inadmissible hearsay. The admission of a party opponent, such as a defendant in a criminal case, is not hearsay. *E.g. State v. Simmons*, 233 S.W.3d 235, 237 (Mo. App. E.D. 2007). Therefore, the trial court did not abuse its discretion in permitting the forensic examiner to testify about the contents of the résumés over Defendant's objection.

B. *Testimony about the existence and location of the résumés was admissible whether or not the documents were authenticated.*

Although Defendant's complaint focuses primarily on the admission of testimony relating to the content of the résumés, the fact that these documents were intermingled with the PowerPoint presentation containing the illicit images was, itself, relevant to prove that Defendant possessed the images, knowing their content and character. The admissibility of the evidence for this

purpose did not depend on the authenticity of the documents—the mere fact that they were there made them relevant.

In possession cases, prosecutors routinely offer evidence showing that a defendant's personal possessions, including mail addressed to the defendant, were intermingled with contraband to establish that the defendant possessed that contraband. *See State v. Warren*, 304 S.W.3d 796, 800-01 (Mo. App. W.D. 2010) (mail addressed to the defendant comingled with marijuana residue and plastic baggies supported inference that the defendant had access to, and knowledge of, the marijuana); *State v. Woods*, 284 S.W.3d 630, 640 (Mo. App. W.D. 2009) (presence of the defendant's papers and mail in the rental car where drugs were found supported inference of possession); *Glover v. State*, 225 S.W.3d 425, 428-29 (Mo. banc 2007) (discovery of sex tape involving defendant in area where drugs were found supported the conclusion that the defendant possessed the drugs). None of these cases suggest that the "personal belongings" must be authenticated before they can be admitted and used to support an inference of possession—it is enough that an item, on its face, appears to belong to the defendant.

In this case, the presence of multiple documents that appeared to be Defendant's résumé, clustered around the icon for the PowerPoint file containing the images of child pornography, supported a reasonable inference that Defendant knew about, and possessed, the images in the PowerPoint file. To the

extent the résumés were admitted simply to prove that they were kept in close proximity to the illegal material, supporting the conclusion that Defendant possessed that material, the admission was not erroneous even without additional authentication.

C. *Testimony relating to the content of the résumés was not so prejudicial that it deprived Defendant of a fair trial.*

Finally, even if this Court concludes that the trial court abused its discretion in admitting the forensic examiner's testimony relating to the content of the résumés, Defendant is not entitled to relief because the admission of the evidence did not deprive Defendant of a fair trial. The content of the résumés was used to establish three things: (1) Defendant's physical address; (2) Defendant's email address; and (3) that Defendant was skilled at using computers and computer programs, including PowerPoint (Tr. 442-43, 446-47).

As trial counsel conceded, Defendant's physical address had already been established and was uncontested (Tr. 269; 444-45). Defendant's email address was referred to at trial only to show that Defendant used the computer (Tr. 390, 392-93). This was also uncontested—as defense counsel put it in closing argument, "Of course [Defendant] uses his own computer" (Tr. 502).

The testimony regarding Defendant's skill with computers was not so prejudicial that Defendant's right to a fair trial was violated. Although the prosecutor mentioned Defendant's computer training in closing argument,

nothing in the evidence suggested that the crime—downloading child pornography and including those images in a PowerPoint presentation—required computer expertise. Defendant did not argue that he was too unfamiliar with computers to have acquired and accessed this pornography. The impact of the evidence relating to the content of the résumés was, in all likelihood, minimal.

As Defendant notes, in evaluating prejudice this Court must decide whether there is a reasonable probability that the jury relied on erroneously admitted evidence in reaching its verdict. App. Sub. Br. at 56 (citing *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. App. W.D. 2004)). Here, given the comparative irrelevance of Defendant's background in computers, there is no reasonable probability the evidence affected the jury's verdict at all. Point III should be denied.

CONCLUSION

The trial court did not commit reversible error in this case. Defendant's convictions should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 9,583 words, excluding the cover, certification, and appendix, as determined by Microsoft Word 2007 software; and that this brief was served through Missouri's electronic filing system on September 4, 2012, to:

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